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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1056

A & B TRANSFER, INC., ET AL., *Petitioners*

v.

S. S. KRESGE COMPANY, *Respondent*

MOTION TO DEFER CONSIDERATION OF PENDING PETITION FOR WRIT OF CERTIORARI

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Petitioners, through counsel, respectfully move this Honorable Court to defer consideration of the pending Petition for a Writ of Certiorari in the above-entitled cause for the reasons set forth in detail hereinafter.

As stated in the Petition for a Writ of Certiorari, this proceeding is one of a series of lawsuits at various stages of litigation (See Appendix A) involving an Interstate Commerce Commission order entered against certain motor carriers, parties to named tariffs of the Middlewest Motor Freight Bureau, requiring those carriers to refund to shippers a certain portion of the rates charged during a fifteen month period ending August 30, 1969. The cases aforesaid are being litigated and decided on various issues and differing theories of law in many forums, and at least several

of them should reach this Honorable Court either singly or in consolidated form as the appeals below are determined. For this Court to be asked to consider these proceedings on a piecemeal case-by-case basis is to create unnecessary duplication and waste of the Court's time. To prevent this, then, and to seek a forum for evaluation of the total situation is the thrust of Petitioners' present Motion to Defer Consideration of their petition pending completion of the appeals below and the consolidation here of those causes susceptible of such treatment.

A petition in this Court for a writ of certiorari to the U. S. Court of Appeals for the Seventh Circuit involving the same order of the Interstate Commerce Commission giving rise to the instant claims is expected soon in a recent case (*Appleton Electric Company* v. *Advance-United Expressways, et al.*, No. 70 C 1427, decided January 16, 1974). *Appleton* has been determined to be appropriately a class action (Rule 23 F.R.C.P.) by the Seventh Circuit, which, if affirmed by this Court prior to its consideration of those companion cases now being briefed, consolidated and argued in the Eighth Circuit, would create added legal and administrative burdens and expenses for those shippers and carriers whose I.C.C. refund order cases are in that Circuit Court.

The cases now before the Eighth Circuit present questions involving statutory construction which have not yet been finally decided by this Court one of which is presently before the Court in *Admiral-Merchants Motor Freight, Inc., et al.* v. *Container Corporation of America and Montgomery Ward & Co., Incorporated*, No. 73-1125, Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Seventh Circuit. It is

respectfully submitted that the Court may have been persuaded to issue the Writ of Certiorari prayed for in *Admiral-Merchants Motor Freight, Inc., et al.* v. *Aluminum Company of America,* No. 73-669, denied December 17, 1973, if the total import of the questions involving the I.C.C. refund order which have been and are being litigated in the Sixth, Seventh and Eighth Circuits had been before the Court at that time. The powers of the I.C.C. and the lower courts to rewrite the Interstate Commerce Act, by incorporating Part I rights (§ 16(2)) into Part II through the use of § 305(g) language, contrary to the express intent of Congress and this Court (*T.I.M.E., Inc.* v. *United States,* 359 U.S. 464 (1959), and the amendment of the Act in response thereto) should be delineated here by the Court to set at rest the questions of statutory interpretation and agency authority raised and not yet answered conclusively by the so-called "refund" cases. Without a well-defined statement of the law as it applies to the motor carrier industry, shippers and carriers alike will be faced with a lack of certainty as to their rights and remedies when forced to rely on the many opinions rendered heretofore in these cases.

This Honorable Court should be afforded an opportunity to decide the question of the grant or denial of a Writ of Certiorari having before it for review all of the questions of law and statutory interpretation then outstanding in cases arising from the Commission's refund order tested before the trial and lower appellate courts of our judicial system. A delay in the Court's consideration of Petitioners' Petition for a Writ in the instant case, and in others now or soon pending, until the present backlog of cases before the Court of Appeals for the Eighth Circuit is brought to

this Court will do much to further the expeditious consideration of the important questions to be presented.

WHEREFORE, petitioners pray that the Court delay consideration of the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit until the cases now before the Court of Appeals for the Eighth Circuit on this subject are ripe for review herein. At that time petitioners will ask that the cases be consolidated for consideration of the various Petitions for Certiorari heretofore and hereafter to be filed.

Respectfully submitted,

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Dated: February 15, 1974